United Nations E/C.19/2018/5

Economic and Social Council

Distr.: General
8 February 2018

Original: English

Permanent Forum on Indigenous Issues
Seventeenth session
New York, 16–27 April 2018
Item 8 of the provisional agenda*
Discussion on the theme "Indigenous peoples' collective rights to lands, territories and resources"

Indigenous peoples' collective rights to lands, territories and resources

Note by the Secretariat

Summary

The present note provides a brief overview of the situation of indigenous peoples with regard to their rights to lands, territories and resources and the challenges that they face in exercising those rights. Recommendations made by the Permanent Forum on Indigenous Issues on the theme "Territories, lands and natural resources" at its 2007 session are taken into consideration therein. The note also provides some examples of good practices and highlights the challenges that remain to bridge the gap between policy and practice.

* E/C.19/2018/1.

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I. Introduction

1. The identity of indigenous peoples as distinct peoples is linked to their rights to own, conserve and manage their own lands, territories and resources, which are fundamental to their survival.

2. In the historic study of the problem of discrimination against indigenous populations prepared by the Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities, José R. Martínez Cobo, he noted that it was essential to know and understand the deeply spiritual, special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and cultures. For such peoples, the land was not merely a possession and a means of production. Their land was not a commodity which could be acquired, but a material element to be enjoyed freely (E/CN.4/Sub.2/1986/7/Add.4, paras. 196–197).

3. During the colonization process in many countries, indigenous peoples' territories were frequently defined as *terra nullius* (no man's land), which provided the justification to occupy the land and at the same time deny indigenous peoples' rights to their lands. For example, all of Australia was defined during colonization as *terra nullius* despite the presence of hundreds of thousands of Australian Aboriginal and Torres Strait Islander peoples. In the Americas, colonizers articulated a doctrine of discovery that provided legal and political justification for the dispossession of indigenous peoples from their lands. Land dispossession was often facilitated by disease and extermination. It is estimated that the entire population of the Americas decreased by up to 95 per cent in the 150 years after its first encounter with Europeans in the late fifteenth and early sixteenth centuries.[1]

4. The concepts of doctrine of discovery and *terra nullius*, together with policies of colonization, whether over land or by sea, perceived indigenous peoples as "backward", "savage" and "inferior" peoples who did not fully understand the concept of land ownership. Attitudes, doctrines and policies were frequently driven by religious, economic and geopolitical ideologies and agendas that justified taking lands from indigenous peoples. Such attitudes are often prevalent to the present day, with Governments, the private sector and others citing national interests, progress and development or conservation as the reason, with the end result that indigenous peoples continue to lose rights and access to their traditional lands, territories and resources.

5. In the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in September 2007, after over 20 years of negotiation and discussions, the rights of indigenous peoples to their lands, territories and resources are recognized — an achievement for indigenous peoples, who have long suffered from "colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests". This dispossession is an existential threat to indigenous peoples: there is a clear link between the loss of indigenous peoples' lands and situations of marginalization, discrimination and underdevelopment of indigenous communities. According to the Chairperson-Rapporteur of the then Working Group on Indigenous Populations, Erica-Irene A. Daes, "the gradual deterioration of indigenous societies can be traced to the

[1] Rodolfo Stavenhagen, "The status and rights of the indigenous peoples of America", report prepared for the Inter-American Commission on Human Rights, July 1991.

non-recognition of the profound relationship that indigenous peoples have to their lands, territories and resources, as well as the lack of recognition of other fundamental human rights" (E/CN.4/Sub.2/2001/21, para. 21).

II. Relevant international standards concerning indigenous peoples' collective rights to lands, territories and resources

6. The rights of indigenous peoples to their lands, territories and resources are extensively covered in the United Nations Declaration on the Rights of Indigenous Peoples, as well as in the Indigenous and Tribal Peoples Convention, 1989 (No. 169), in articles 13 to 19, and the earlier Indigenous and Tribal Populations Convention, 1957 (No. 107), of the International Labour Organization (ILO). The centrality of the rights of indigenous peoples to lands, territories and resources is illustrated by the fact that there are 19 references to lands and territories in the Declaration (see e.g. the sixth, seventh and tenth preambular paragraphs and arts. 8, 10, 25–26, 28–30 and 32). Of particular relevance is article 26, which reads:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Universal instruments also enshrine the said rights.

7. The ILO supervisory system has made a number of observations on the rights of indigenous and tribal peoples to their lands, territories and resources when examining the reports on compliance with Convention No. 169 and the earlier Convention No. 107. The Committee of Experts on the Application of Conventions and Recommendations has consistently emphasized the importance of secure land tenure, effective consultations and the participation of indigenous peoples in land management.[2]

8. There are also implicit references to land rights in a number of international instruments, including the Universal Declaration of Human Rights (art. 17, which refers to property rights), the International Covenant on Civil and Political Rights (arts. 3 and 27), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 and general recommendation No. 23 (1997) on the rights of indigenous peoples). In monitoring compliance with the provisions of specific treaties, treaty bodies have developed a sound body of jurisprudence on indigenous peoples that is of relevance to land rights, in particular in relation to article 27 of the International Covenant on Civil and Political Rights, which reads:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with

[2] Based on a review of online comments by the supervisory bodies, available from www.ilo.org/dyn/normlex/en/.

the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

9. Under article 27, the Committee addresses the impact of development projects and evictions on land rights and the welfare of indigenous peoples, through the application of the principle of free, prior and informed consent as the guiding norm for compliance with a State's duty to consult. Other recent issues raised under article 27 of the Covenant, relating to country-specific situations, involved: (a) the need for prompt demarcation of indigenous lands; (b) encouraging legislation recognizing indigenous land rights; (c) the conferral of title recognition on a group as an indigenous people; (d) the active protection of language; (e) effective access to land restoration processes; (f) the provision of adequate resources to indigenous representative bodies; (g) effective access to justice; (h) the length of negotiations; (i) strengthening indigenous education and child and family services; (j) the protection of sacred areas; and (k) participation in law-making.[3]

III. Permanent Forum on Indigenous Issues

10. Since the establishment, in 2000, of the Permanent Forum on Indigenous Issues by the Economic and Social Council, at each of its sessions indigenous peoples have emphasized the spiritual, social, cultural, economic and political significance of lands, territories and resources to their identity, well-being and survival.

11. The special theme of the sixth session of the Permanent Forum on Indigenous Issues, in 2007, was "Territories, lands and natural resources". In its report on the session, the Permanent Forum emphasized that the protection of indigenous peoples' right to lands, territories and natural resources was a key demand of indigenous peoples everywhere, central to their material and cultural survival, and that, in order to survive as distinct peoples, indigenous peoples and their communities needed to be able to own, conserve and manage their territories, lands and resources (E/2007/43, paras. 5–6).

12. The Permanent Forum emphasized the following principles:

(a) Indigenous peoples are entitled to effectively participate in drafting policies and laws related to resource management and development processes;

(b) Indigenous peoples have a central role in decision-making and implementation of land- and resource-related projects;

(c) Indigenous peoples have a central role in dispute resolution over lands, territories and resources;

(d) States have an obligation to protect indigenous peoples' rights to lands, territories and resources, and those rights must be effectively enforced through penalties for harmful activities on indigenous peoples' lands;

(e) States have an obligation, in cooperation with indigenous peoples, to identify indigenous peoples' lands and to provide specific legal protection for the rights of ownership over those lands.

13. The Permanent Forum has continued to focus on the issues and concerns of indigenous peoples, which have often been linked inextricably to their land rights. A

[3] For more details, see the United Nations treaty body database, available from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en.

number of studies conducted by Forum members have highlighted the rights to lands, territories and resources.

14. At the tenth session of the Permanent Forum, in 2011, a press conference on extractive industries and mega-projects in territories of indigenous peoples[4] was held, highlighting the need for Governments, multinational corporations and banks to respect international environmental standards when extracting natural resources or constructing projects in biologically diverse lands.

15. In 2013, at the twelfth session of the Permanent Forum, a consolidated report on extractive industries and their impact on indigenous peoples (E/C.19/2013/16) was prepared by Saúl Vicente Vázquez. At the thirteenth session, in 2014, a study on best practices and examples in respect of resolving land disputes and land claims, including consideration of the National Commission on Indigenous Peoples (Philippines) and the Chittagong Hill Tracts Land Dispute Resolution Commission (Bangladesh) and the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights (E/C.19/2014/4) was conducted by Raja Devasish Roy and Simon William M'Viboudoulou. Other studies conducted by Forum members also have a bearing on the issue.[5]

16. At its sixteenth session, in 2017, which marked the tenth anniversary of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, the Permanent Forum reiterated its position that "collective rights to lands, territories and resources and the right to self-determination, as recognized in articles 3 and 26, are among the most important provisions of the Declaration and the most challenging to implement. Legal recognition of indigenous peoples' rights to lands, territories and resources must be complemented by effective implementation through enabling legislation, executive action and judicial protection. It is also critical that legislation enacted to establish recognition of indigenous peoples' rights not be undermined or contravened by other laws and regulations" (E/2017/43, para. 5).

IV. Challenges faced by indigenous peoples in exercising their collective rights to lands, territories and resources

17. The challenges faced by indigenous peoples in exercising and enjoying both individual and collective rights to lands, territories and resources are due to a range of factors related to conflicts, extractive industries, infrastructure and development projects, commercial logging, population and socioeconomic pressures.

18. In many countries, the fact that indigenous peoples inhabit and use specific lands and territories and have often done so since time immemorial is often ignored and not given due recognition. Those areas are typically geographically isolated and far from major urban areas. The indigenous peoples in those territories regard themselves as the rightful owners of the lands and continue to manage the land as they have in the past. States tend to have a different view, and there are innumerable examples of State action that has denied indigenous peoples' rights to their lands, territories and resources and effectively defined indigenous peoples as squatters on their own lands.

[4] United Nations, "Press conference on extractive industries, mega-projects in territories of indigenous peoples", press release, 17 May 2011. Available from www.un.org/press/en/2011/110517_Indigenous.doc.htm.

[5] See www.un.org/development/desa/indigenouspeoples/ for more details.

19. Some countries do not recognize the existence of indigenous peoples within their borders, either stating that all of their citizens are equally indigenous or that there are no indigenous peoples in their countries. In some instances, there is recognition of ethnic minorities and/or tribal peoples, but it is very rarely connected to the recognition of collective rights to lands, territories and resources.

20. Indigenous peoples frequently face legal, political and administrative barriers to the recognition of their collective rights to their lands, territories and resources. Even when indigenous peoples' rights are recognized, land may be allotted to individuals and families, rather than to indigenous peoples as a collective group. Such land allocation can divide the community and serves to weaken the indigenous community or peoples, which invariably results in the fragmentation of their lands and the eventual loss of most, if not all, of the land, due to their sale, transfer and use as collateral for loans.

21. Some States do acknowledge that indigenous peoples have legal collective entitlements to lands, territories or resources, with specific legal concepts such as aboriginal title or ancestral domain. However, such rights are often subject to State power to extinguish such title, in contrast to legal protection in most countries for the lands and properties of non-indigenous citizens and corporations. Ms. Daes noted that "this single fact probably accounts for the overwhelming majority of human rights problems affecting indigenous peoples" (E/CN.4/Sub.2/2001/21, para. 38).

22. Even when States recognize indigenous peoples' rights to their territories, they frequently fail to demarcate indigenous lands. A mapping exercise that involves formally identifying specific locations and boundaries of indigenous lands and physically marking those boundaries on the ground is crucial. Relying only on legal recognitions of indigenous lands, territories and resources has been shown to be almost meaningless, unless the physical property is clearly demarcated. Failure to do so invites conflicts over land, especially when valuable resources are involved.

23. It is equally important to ensure that indigenous peoples' rights to lands are adequately enforced, since fences can be moved, signs can be taken down and forests can be burned and turned into palm tree plantations, especially when there is no enforcement by State authorities. Indigenous peoples often also struggle to find effective recourse to courts or other legal remedies and are vulnerable to violence, intimidation and corruption. In the most extreme cases, indigenous human rights defenders are subjected to serious human rights violations, including assassinations.

24. According to Front Line: International Foundation for the Protection of Human Rights Defenders, 312 human rights defenders were murdered in 27 countries in 2017. [6] Two thirds of them were working to defend land, indigenous and environmental rights. The organization documented 281 killings of human rights defenders in 2016, 185 killings in 2015 and 130 in 2014. The majority of those murders occurred in a small number of countries in Latin America and Asia, although it must be stressed that indigenous human rights defenders in all regions of the world face increasing levels of reprisals.

25. When valuable resources are discovered on or beneath indigenous peoples' lands, or when the exploitation of their lands is directly associated with national development priorities or national interests, indigenous peoples have been and continue to be removed from their lands and territories. Removal and relocation are

[6] Annual report on human rights defenders at risk in 2017, available from www.frontlinedefenders.org/en/resource-publication/annual-report-human-rights-defenders-risk-2017.

typically employed in cases of large-scale infrastructure projects (highways, hydroelectric dams), natural resource extraction (gold mining, oil and gas extraction, logging) or agriculture projects (soybean cultivation, palm oil plantations). Activities by the military are another cause of forced removal. The effects on indigenous peoples are typically devastating, involving not only the loss of lands and territories but also the loss of traditional livelihoods, cultures and languages and poorer health outcomes.

26. Indigenous peoples are often directly or indirectly affected by conflicts that occur on or close to their traditional lands. The Permanent Forum, at its 2016 session, focused on the theme of conflicts and found that, even in peaceful societies, indigenous peoples often found themselves involved in situations that escalated to conflict relating mostly to their lands, territories and resources (E/2016/43 , para. 49). The rapid pace of globalization and processes to identify new venues for resource exploitation have accelerated such conflicts on indigenous peoples' land. Indigenous peoples also increasingly experience armed conflicts and militarization on their lands.

27. With a growing understanding of the importance of sustainable development and conservation, as well as in response to international agreements, States have increasingly designated significant amounts of territories for conservation. Such areas are often inhabited by indigenous peoples, and the designation of the areas frequently leads to indigenous peoples' displacement.

28. Tourism has also had a similar effect, although there are also important examples of indigenous peoples themselves participating in the administration of nature reserves and national parks, as well as in tourism activities.

V. Achievements and the way forward

29. Some positive steps have been taken to address past injustices and to recognize indigenous peoples' collective rights to their lands. For example, the Plurinational State of Bolivia, in its 2009 Constitution, recognizes indigenous legal systems and collective ownership and autonomous management of indigenous lands, as well as the right of indigenous peoples to prior consultation regarding any legislative or administrative measures that affect them. In the Constitution of Ecuador, the collective rights of indigenous peoples, including the collective ownership of their lands and their autonomy in the government of indigenous territories, are also recognized. In Canada, the creation of Nunavut ("our land" in Inuktitut, the Inuit language) in 1999 was the outcome of the largest aboriginal land claims agreement between the Government and the native Inuit people. In 2013, the Constitutional Court of Indonesia ruled that the customary forests of indigenous peoples should not be classified as "State forest areas", enabling wider recognition of indigenous peoples' collective rights to their territories. The Government of Indonesia has begun to enforce that decision, although progress has been modest.

30. A good example is the adoption in Norway in 2005 of the Finnmark Act, which creates a unique land rights claims procedure for lands and resources that have been transferred to the Finnmark Estate. Pursuant to the Act, the established Finnmark Commission and Finnmark Land Tribunal are mandated to consider and decide on land rights claims from Sami and others. The Commission is the entity of first instance, whereas the Tribunal is the special court of appeals.

31. If the Commission concludes that there is a rightful owner other than the Finnmark Estate, the Estate will decide whether to accept the conclusions of the Commission. If it accepts the conclusions, it shall ensure that such rights are

registered. In cases where the Estate, or any other party, is dissatisfied with the conclusions of the Commission and the Commission fails to facilitate an agreement between the parties through a mediation process, the dispute can be filed with the Tribunal. Cases can be further appealed to the Norwegian Supreme Court.

32. In recent years, the Government of Colombia has expanded indigenous territories (*resguardos indígenas*) in the Amazon region by approximately 600,000 ha, as protected areas, recognizing indigenous peoples' right to their lands, which is also a recognition of their traditional knowledge in sustainable land management.

33. Indigenous peoples in Africa have also seen some gains through the courts. In the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* of 4 February 2010,[7] the African Commission on Human and Peoples' Rights declared that the expulsion of the Endorois from their ancestral lands violated numerous human rights of the African Charter on Human and Peoples' Rights, including the right to property, culture, disposal of wealth and natural resources, ordering Kenya to restore the Endorois to their land and to compensate them.

34. Notwithstanding court decisions, legal recognition and administrative decisions, there is ultimately a need for implementation on the ground. The Special Rapporteur on the rights of indigenous peoples has made the following observation:

> Land-titling procedures have been slow and complex and, in many cases, the titles awarded to the communities are not respected in practice. At the same time, privatization of traditional lands is on the increase. This measure is claimed to benefit indigenous owners in that it provides legal certainty. The Special Rapporteur has, however, observed that in the long run the indigenous communities tend to lose their traditional lands and territories to the various private economic interests of either firms or individual invaders and settlers who have managed to install themselves in traditional indigenous areas. (A/HRC/4/32, para. 14)

35. Indigenous peoples' land rights are particularly vulnerable when valuable natural resources are identified within their territories, when infrastructure projects such as highways or hydroelectric dams are built on their traditional lands and when their territories are identified for large-scale agricultural development. The production of soy, palm oil and other commodities accounts for roughly half of global deforestation, which subsequently also displaces indigenous peoples who live and depend on forests for their survival. Other examples include gold mines in Guatemala and the Philippines, zinc mines in Australia and petroleum extraction in Cameroon and Chad. The trends are similar around the world. Such practices not only have negative effects on the affected indigenous peoples but are frequently a cause of social conflicts that can undermine the stability of entire countries.

36. Such activities are frequently public-private partnerships that have an impact on the capacity of States to protect indigenous peoples' rights. This further highlights the need for Governments and international entities to create inclusive consultative mechanisms that lead to outcomes that are legally binding. Such mechanisms should not only ensure effective consultations, based on the principle of free, prior and informed consent, but also allow indigenous peoples to fairly share in the benefits of such activities.

[7] Available from www.refworld.org/cases,ACHPR,4b8275a12.html.

VI. Questions for consideration

37. In view of the information presented in the present note regarding the achievements and continued challenges to the realization of the collective rights of indigenous peoples to lands, territories and resources, the Permanent Forum may wish to frame its discussion of the issue around the following guiding questions:

1. How can the collective rights of indigenous peoples to their lands, territories and resources be guaranteed?
   (a) What are examples of indigenous peoples' access to justice?
   (b) What is the role of indigenous governance institutions?
2. Taking into consideration the increasing recognition of indigenous peoples' collective rights to their lands, territories and resources, can the persistent implementation gap be bridged?
   (a) What are good examples of laws, policies and administrative measures that promote and protect the collective rights of indigenous peoples?
   (b) How can the judiciary protect the collective rights of indigenous peoples?
   (c) How can court decisions on indigenous peoples' land rights be enforced?
   (d) How can human rights institutions promote and protect the collective rights of indigenous peoples?
3. What is the role of business in respecting indigenous peoples' collective rights to their lands, territories and resources?
   (a) What is the role of the State?
   (b) What is the role of the international community?
   (c) What is the role of investors and financial institutions?
4. What are good examples of indigenous peoples and their organizations advancing and securing their collective rights to lands, territories and resources:
   (a) Existing and planned mapping and demarcation initiatives;
   (b) Community conservation programmes;
   (c) Securing land titles and tenure rights;
   (d) Successful alliances, networks and partnerships?
5. How can an environment of impunity and lack of accountability be addressed? What actions should be taken to protect indigenous human rights defenders?
6. How can the indigenous peoples' collective rights to lands, territories and resources be aligned with conservation efforts?
7. How can the indigenous peoples' collective rights to lands, territories and resources be aligned with national development priorities?